Supreme Court, U.S.
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No. 92-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ERNEST DAVIDSON, DARLENE DAVIDSON,
Individually and as Guardians ad Litem
of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR.,
their minor children,
Petitioners,

v.

VELSICOL CHEMICAL CORPORATION, an
Illinois Corporation,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether section 136v of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common law tort claims based on inadequate labeling of pesticides.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

A. The Lower Federal and State Courts Are Split Irreconcilably On Whether FIFRA Preempts Common Law Inadequate Labeling Claims. 9

1. Before *Cipollone* 9

2. After *Cipollone* 11

B. The Nevada Supreme Court's Ruling Clearly Conflicts With This Court's Ruling In *Cipollone* 15

C. The Nevada State Court Erroneously Decided An Important Federal Question: Whether FIFRA Preempts State Common Law Inadequate Labeling Claims 16

1. FIFRA Does Not Expressly Preempt Inadequate Labeling Claims 17

2. The Court Below Erred in Finding Implied Preemption . . 20

CONCLUSION 21

TABLE OF AUTHORITIES

Cases:

Abelman v. Velsicol Chem. Corp., No. 12611 (Md. Cir. Ct. Montgomery County May 17, 1991) 11
Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 959 F.2d 158 (10th Cir.), *vacated and remanded sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*, 113 S.Ct. 314 (1992), *on remand*, No. 91-1085 (January 5, 1993), *motion for reconsideration denied* (Feb. 9, 1993) . . 8, 9, 11, 13, 14
Bander v. Southern States Cooperative, Inc., No. 92-CA-19196 (Md. Cir. Ct. Howard Cty., Dec. 31, 1992) 11
Begley v. Truly Nolan Exterminating, Inc., 573 S.2d 1038 (Fla. Dist. Ct. App. 1991) 10
Brennan v. Dow Chemical Co., No. 91-2292 (Fla. Ct. App. Feb. 3, 1993) 11, 12
Brooks v. S.C. Johnson & Son, Inc., No. 86-4136 (S.D. Ill. Jan. 10, 1990) 10
Burge v. Jones, CV B-92-022 (S.D. Tex. Nov. 18, 1992). 11
Burke v. Dow Chemical Co., 797 F. Supp. 1128 (E.D.N.Y. 1992) 11, 13, 14
Cannon v. Chapman Chem. Co., No. 88-2252 (W.D. Ark. Mar. 5, 1990) 10
Casper v. E.I. Dupont De Nemours, 806 F. Supp. 903 (E.D. Wash. 1992) 11
Chavolla v. Shell Chem., No. 548003 (Cal. Super. Ct. May 31, 1990) 10
Ciba-Geigy Corp. v. Alter, 309 Ark. 426, 834 S.W.2d 136 (1992) 9

Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608 (1992) 5-9, 11-17, 20
Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043, (1987), *after remand*, 893 F.2d 541 (3d Cir. 1990), *rev'd in part, aff'd in part*, 112 S.Ct. 2608 (1992) 7, 9, 10
Couture v. Dow Chemical U.S.A., 804 F. Supp. 1298 (D. Mont. 1992) 11-14
Cox v. Velsicol Chem. Co., 704 F. Supp. 85 (E.D. Pa. 1989) 10
Darrow v. Vacudyne, Inc., No. 88-CV-40467-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990) 10
Evenson v. Osmose Wood Preserving, Inc., 760 F. Supp. 1345 (S.D. Ind. 1990) 10
Ferebee v. Chevron Chemical Co., 736 F.2d 1539 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) 7, 9, 14, 19, 20
Fisher v. Chevron Chem. Co., 716 F. Supp. 1283 (W.D. Mo. 1989) 10
Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404 (E.D. Mich. 1987) 10
Fullmer v. Arab Termite & Pest Control, Inc., No. 29C 018907 CT415 (Ind. Cir. Ct. Hamilton County May 24, 1991) 10
Gibson v. Dow Chemical Co., CV 92-30 (E.D. Ky. Oct. 19, 1992) 11
Herr v. Carolina Log Bldgs., Inc., 771 F. Supp. 958 (S.D. Ind. 1989) 10
Jordan v. Southern Wood Piedmont Company, 805 F. Supp. 1575 (S.D. Ga. 1992) 11
Kennan v. Dow Chem. Co., 717 F. Supp. 799 (M.D. Fla. 1989) 10
King v. E.I. Dupont De Nemours, 806 F.Supp. 1030

(D. Me. 1992), *appeal filed*, No. 92-2381 (1st Cir. Nov. 20, 1992) 11, 12
Lorillard v. Pons, 434 U.S. 575 (1978) 19
Mims v. Mobay Corp., No. M-88-157 (S.D. Tex. June 6, 1991) 10
Montana Pole & Treating Plant v. I.E. Laucks & Co., 775 F.Supp. 1339 (D.Mont. 1991), *appeal filed*, No. 91-36201 (9th Cir. Apr. 21, 1992) 10, 12
National Coalition Against Misuse of Pesticides v. E.P.A., 867 F.2d 636, 639 (D.C. Cir. 1989) 3
Packowski v. Orkin Exterminating Co., No. 85-46671-NI (Mich. Cir. Ct. Kent County May 5, 1989) 10
Papas v. Upjohn, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S.Ct. 3020 (1992) 8, 9, 12
Parkins v. Mobay Corp., No. 1-89-CV-2471-MHS (N.D. Ga. Feb. 11, 1992), *appeal filed*, No. 92-8203 (11th Cir. Feb. 25, 1992) 12
Perkins v. Northeastern Log Homes, Inc., No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992) 10
Perry v. Dow Chem. Co., No. CL 88 10227AN (Fla. Cir. Ct. Palm Beach County June 29, 1989) 10
Privette v. Armour Exterminating, No. 85-6279 CA (Fla. Cir. Ct. Palm Beach County Feb. 26, 1988 and Mar. 16, 1988) 10
Riden v. ICI Americas, Inc., 763 F. Supp. 1500 (W.D. Mo. 1991) 10
Roberts v. Dow Chem. Co., 702 F. Supp. 195 (N.D. Ill. 1988) 10
Southern Colo. Farms, Inc. v. Green, No. 88 CV 40 (Colo. Dist Ct. Saguache County June 7, 1991) 10
Thornton v. Fondren Green Apartments, 788 F.Supp. 928 (S.D. Tex. 1992) 20
Velsicol Chemical Corp. v. Davidson, 811 P.2d 561

(Nev. 1991) 4
Villari v. Terminix Int'l, 692 F. Supp. 568 (E.D. Pa. 1988) 10
Whitener v. Reilly Indus., Inc., No. 87-5224 (S.D. Ill. Oct. 25, 1989) 10
Wilson v. Chevron Chem. Co., No. 85 Civ. 762 (JFK) (S.D.N.Y. May 18, 1986) 10
Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476 (1991) 20
Worm v. American Cyanamid Co., 970 F.2d 1301 (4th Cir.), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992) 9, 11, 12
Young v. American Cyanamid Co., 786 F. Supp. 781 (E.D. Ark. 1991) 10
Yowell v. Chevron Chemical Co., 836 S.W. 2d 62 (Mo. Ct. App. July 13, 1992) 11

Statutes and Regulations:

7 U.S.C. § 136(g)(1)(F)-(G) 18
7 U.S.C. § 136a(c)(1)(C) 19
7 U.S.C. § 136a(c)(5)(C) 14
7 U.S.C. § 136a(f)(2) 18
7 U.S.C. § 136d(a)(2) 18
7 U.S.C. § 136v(a) 17
7 U.S.C. § 136v(a)-(b) 6, 20
7 U.S.C. § 136v(b) 17-19
7 U.S.C. §§ 136-136y 2
15 U.S.C. § 1334 18
28 U.S.C. § 1257(a) 1
40 C.F.R. § 152.132(d)(5) 19
40 C.F.R. § 152.44 19
40 C.F.R. § 152.46 19

40 C.F.R. § 152.46(a) 19
40 C.F.R. § 152.50(e) 19
40 C.F.R. §§ 152.130(b) & (c) 19
49 Fed. Reg. at 37,960-61 18
Fed. Reg. 11,298 (Nov. 24, 1974) 3

Legislative Materials:

S. Rep. No. 838, 92d Cong. 2d Sess. (1972) 19

Other Authority:

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada is reported at 108 Nev. Adv. Ops. No. 103, 834 P.2d 931 (Nev. 1992) and is reproduced in the petitioners' appendix (Pet.App.) at 2a -19a. The Judgment is reproduced at Pet.App. 1a-2a. The decision of the District Court for Clark County, Nevada, entitled Order Re: Post-1979 Label Changes is reproduced in the Pet.App. at 20a-25a. The Order of the District Court for Clark County, Nevada, Certifying Final Order For Interlocutory Appeal was filed on June 5, 1991 and is reproduced in the Pet.App. at 26a-32a.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on August 12, 1992. *See* Pet.App. 1a. Petitioner filed a timely petition for rehearing on August 27, 1992, which the Nevada Supreme Court denied on November 3, 1992. *See* Pet.App. 33a. On January 8, 1993, Justice O'Connor signed an Order extending the time within which to file this petition to and including March 1, 1993. *See* Pet.App. 35a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

> § 136v. Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

STATEMENT OF THE CASE

This is a common law action under Nevada law for severe personal injuries and property damage caused by an inadequately labeled pesticide. On July 27, 1979, an applicator working for former defendant Bill Beckmyer's Pest-A-Way (Pest-A-Way) broadcast sprayed defendant Velsicol Chemical Corporation's (Velsicol) Gold Crest Termide over the dirt area of a crawl space under the Davidsons' home living quarters. Gold Crest Termide contained the active ingredients chlordane and heptachlor.[1]

At the time, Velsicol knew that broadcast spraying posed a danger to human life and that applicators were broadcast spraying its termiticides in crawl spaces. Its label, however, did not specifically prohibit the practice. The very next year, Velsicol changed its label to include a specific prohibition against broadcast spraying. In a November 6, 1984 letter from its Regulatory Coordinator to the Nevada Department of Agriculture, it acknowledged the inadequacy of its label:

> [W]ithout a strict prohibition on the label, some pest control operators applied termiticides to crawlspaces as a broadcast spray. In mid-1980, a specific statement was added to the label to end this practice.

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[1] The EPA banned agricultural uses of chlordane and heptachlor in 1975. One of the uses still permitted was termite control. *See* 39 Fed. Reg. 11,298 (Nov. 24, 1976), *cert. denied sub nom.*, *Velsicol v. E.P.A.*, 431 U.S. 925 (1977). In July of 1987, in the face of an imminent EPA cancellation proceeding, Velsicol agreed voluntarily to cancel its registration for termite control use. *See National Coalition Against Misuse of Pesticides v. E.P.A.*, 867 F.2d 636, 639 (D.C. Cir. 1989).

as a broadcast spray. In mid-1980, a specific statement was added to the label to end this practice.

In 1984, the Nevada Department of Agriculture held a hearing to investigate Pest-A-Way's broadcast application of the Davidsons' home. Relying on Velsicol's 1984 letter, the Hearing Examiner found Velsicol blameworthy for the misapplication because 1) Velsicol acknowledged that its 1979 label did not prohibit broadcast spraying of crawl spaces; and 2) the lack of a prohibition against broadcast spraying was construed by applicators to permit that technique. Prompted by the Hearing Examiner's findings, coupled with chronic health problems the family was experiencing, the Davidsons filed suit for themselves and their minor children against Pest-A-Way and Velsicol on March 20, 1986.[2]

On July 23, 1988, the Washington Analytical Laboratories, Inc. conducted an on-site inspection of the Davidson home and took samples. Analysis of the samples indicated unhealthy levels of chlordane and heptachlor still in the home and on the children's clothing. The Davidsons then vacated their residence and filed an amended complaint. The amended complaint seeks relief under Nevada state common law theories of negligence and strict liability, including failure to provide adequate warnings and failure to instruct on the proper application of a product. The Davidsons seek compensatory and punitive damages for chronic health problems, the spontaneous abortion of a genetically and

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[2] The Davidsons settled their claims against the applicator for the misapplication in the Davidson home. The Nevada Supreme Court affirmed that the settlement was made in good faith. *Velsicol Chemical Corp. v. Davidson*, 811 P.2d 561 (Nev. 1991).

physically deformed fetus in 1980, the fear of developing life-shortening disease, and damage to their property.[3]

On January 23, 1991, the Davidsons filed a motion *in limine* asking the trial court to rule that evidence of Velsicol's post-accident label change would be admissible at trial. Velsicol filed a counter-motion *in limine* on February 4, 1991. The District Court of Clark County denied the Davidsons' motion and granted Velsicol's motion on April 5, 1991, reasoning that FIFRA impliedly preempts state common law tort actions based on an inadequate labeling theory. Pet.App. at 21a-23a.[4]

On April 24, 1991, the Davidsons filed a "Motion For Rehearing And Reconsideration And/Or For Certification For Interlocutory Appeal Of This Court's Order Of April 5, 1991." The court denied the Motion For Reconsideration, but certified its April 5, 1991 Order for interlocutory appeal to the Nevada Supreme Court. Pet.App. at 26a-31a. In so doing, it found that its prior order was, in fact, an Order Granting Partial Summary Judgment in favor of Velsicol concerning all claims based on the inadequacy of Velsicol's label. Pet.App. at 29a.

In a decision filed after this Court's opinion in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992), the Nevada Supreme Court noted that there was "a split of

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[3] Since the Davidsons' allegations were not challenged in the motion that resulted in summary judgment being entered for Velsicol on federal preemption grounds, the complaint's allegations should be taken as true.

[4] The court ruled that "all evidence relating to post-1979 Gold Crest Termide label changes shall be excluded from evidence at the trial of this matter." Pet.App. at 23a.

authority" on FIFRA preemption and noted appellate and trial court cases on both sides of the question. Pet.App. at 6a. It then affirmed the Clark County court's finding. Pet.App. at 18a.

In the first part of its analysis, the Nevada Supreme Court reviewed the language of FIFRA's preemption provision, 7 U.S.C. § 136v(a)-(b), and held that it does *not* expressly preempt inadequate labeling claims. It found that, "[S]ection 136v(b) makes no reference to the pre-emption of state common law remedies. Because Congress has expressly pre-empted common law in other pre-emption clauses, Congress' silence cannot be ignored -- it is inimical to a finding of express pre-emption." Pet.App. at 8a.

Instead of ending its analysis after this determination, as *Cipollone* mandates, 112 S.Ct. at 2618, the court then undertook an implied preemption analysis. It stated:

> Our opinion is consonant with *Cipollone* in that we address implied pre-emption only after concluding that FIFRA does not expressly pre-empt such claims ....
>
> We do not find *Cipollone* instructive on whether FIFRA pre-empts the Davidsons' claims .... Perhaps Justice Blackmun articulated it best in *Cipollone* when he stated: "I can only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision." *Cipollone*, [112 S.Ct. at 2631].

Pet.App. at 6a.

The Nevada Supreme Court then held the Davidsons' inadequate labeling claims impliedly preempted. Pet.App. at 14a. It announced that, in its view, FIFRA occupies the entire field of pesticide labeling and common law inadequate labeling claims would directly conflict with FIFRA. Pet.App. at 17a.

On August 27, 1992, the Davidsons petitioned the Nevada Supreme Court to reconsider its decision on the ground that it ignored this Court's holding in *Cipollone*. On November 3, 1992, the Nevada court denied the petition. Pet.App. at 33a.

REASONS FOR GRANTING THE WRIT

For 14 years after FIFRA was amended in 1972, no reported decision suggested that FIFRA's preemption provision prevented pesticide poisoning victims from pursuing any state common law claims. Indeed, in the only reported decision during that period on the subject, the D.C. Circuit held that FIFRA does *not* preempt common law claims. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1539 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). During those years, untold numbers of pesticide poisoning victims, who are afforded no compensation under FIFRA, successfully sought and obtained compensation from pesticide manufacturers. These damage actions also spurred the manufacturers to improve their labels.

In 1986, the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043, (1987), *after* remand, 893 F.2d 541 (3d Cir. 1990), *rev'd in part, aff'd in*

part, 112 S.Ct. 2608 (1992), finding all inadequate labeling claims brought by cigarette smokers after 1965 impliedly preempted. Despite the myriad differences between cigarette legislation and FIFRA (including the fact that the former dictates the language of cigarette labels, while the latter leaves labeling decisions to pesticide manufacturers), the pesticide manufacturers started urging the courts to apply the Third Circuit's logic to FIFRA.

Relying on the Third Circuit's decision in *Cipollone* or on its progeny, a number of trial courts throughout the nation began adopting the pesticide manufacturers' arguments. In 1991, in *Papas v. Upjohn*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S.Ct. 3020 (1992), the Eleventh Circuit became the first appellate court to find common law claims impliedly preempted by FIFRA. Prior to this Court's decision last term in *Cipollone*, several other appellate and trial courts followed suit. *See, e.g., Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *vacated and remanded sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*, 113 S.Ct. 314 (1992), *on remand*, No. 91-1085 (January 5, 1993), *motion for reconsideration denied* (Feb. 9, 1993). Shortly after deciding *Cipollone*, and recognizing that its analysis in that case would shape the determination of FIFRA preemption, this Court vacated the Eleventh Circuit's decision in *Papas*, *supra*, and the Tenth Circuit's decision in *Arkansas-Platte*, *supra*, and remanded them for reconsideration.

While many hoped that *Cipollone* would resolve the issue, the confusion and conflict among the lower courts remains. This muddled and unjust state of the law should no

longer be countenanced. This Court should accept *certiorari* or, in the alternative, summarily reverse the decision below.

A. The Lower Federal and State Courts Are Split Irreconcilably On Whether FIFRA Preempts Common Law Inadequate Labeling Claims.

Courts before and after *Cipollone* have been divided over whether FIFRA preempts state common law claims of inadequate labeling. Without guidance from this Court, the currently confused state of the law will only continue.

1. Before *Cipollone*.

Before this Court issued its opinion in *Cipollone*, five appellate courts ruled on whether FIFRA preempts state common law tort actions. The only two that squarely considered the issue both found that FIFRA does not expressly preempt *any* common law claims. *Ferebee*, *supra*, 736 F.2d at 1529; *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). These two courts also found no implied preemption. The other three appellate courts disagreed, however, following the now-rejected reasoning of the Third Circuit's decision in *Cipollone*, or its progeny, and finding implied preemption.[5]

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[5] *Papas*, *supra*; *Arkansas Platte*, *supra*, and *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir.), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992)(using classic implied preemption terminology, the 4th Circuit held failure to warn claims preempted because they "conflict" with FIFRA).

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Lower court opinions showed a similar conflict. After the Third Circuit's decision in *Cipollone*, federal district courts variously held state common law inadequate warning claims expressly preempted,[6] impliedly preempted,[7] and not preempted at all.[8] The numerous opinions from lower state courts on this preemption issue likewise showed a widespread conflict.[9] Simply put, the courts were

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[6] *See Herr v. Carolina Log Bldgs., Inc.*, 771 F. Supp. 958 (S.D. Ind. 1989); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987).

[7] *See, e.g., Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Mims v. Mobay Corp.*, No. M-88-157 (S.D. Tex. June 6, 1991); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989).

[8] *See, e.g., Perkins v. Northeastern Log Homes, Inc.*, No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992); *Montana Pole & Treating Plant v. I.E. Laucks & Co.*, 775 F.Supp. 1339 (D.Mont. 1991), *appeal filed*, No. 91-36201 (9th Cir. Apr. 21, 1992); *Riden v. ICI Americas, Inc., 763 F. Supp. 1500* (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Darrow v. Vacudyne, Inc.*, No. 88-CV-40467-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990); *Cannon v. Chapman Chem. Co.*, No. 88-2252 (W.D. Ark. Mar. 5, 1990); *Brooks v. S.C. Johnson & Son, Inc.*, No. 86-4136 (S.D. Ill. Jan. 10, 1990); *Whitener v. Reilly Indus., Inc.*, No. 87-5224 (S.D. Ill. Oct. 25, 1989); *Cox v. Velsicol Chem. Co.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Villari v. Terminix Int'l*, 692 F. Supp. 568 (E.D. Pa. 1988); *Wilson v. Chevron Chem. Co.*, No. 85 Civ. 762 (JFK) (S.D.N.Y. May 18, 1986).

[9] Cases finding no preemption include *Chavolla v. Shell Chem.*, No. 548003 (Cal. Super. Ct. May 31, 1990); *Perry v. Dow Chem. Co.*, No. CL 88 10227AN (Fla. Cir. Ct. Palm Beach County June 29, 1989); *Privette v. Armour Exterminating*, No. 85-6279 CA (Fla. Cir. Ct. Palm Beach County Feb. 26, 1988 and Mar. 16, 1988); *Packowski v. Orkin Exterminating Co.*, No. 85-46671-NI (Mich. Cir. Ct. Kent County May 5, 1989). Cases finding preemption include *Begley v. Truly Nolan Exterminating, Inc.*, 573 S.2d 1038 (Fla. Dist. Ct. App. 1991); *Southern Colo. Farms, Inc. v. Green*, No. 88 CV 40 (Colo. Dist Ct. Saguache County June 7, 1991); *Fullmer v. Arab Termite & Pest Control, Inc.*, (continued...)

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bedeviled by the FIFRA preemption question before this Court's decision in *Cipollone*. They continue to be baffled today.

2. After *Cipollone*.

At least thirteen state and federal courts have addressed the issue of whether FIFRA preempts state common law claims of inadequate labeling since this Court's decision in *Cipollone*. Using varying analyses, one ruled that claims of inadequate labeling are not preempted[10], six found at least some express preemption,[11] and six found at least some implied preemption.[12] Included among these opinions are four post-*Cipollone* appellate court decisions: *Arkansas-Platte*, *supra*, *Yowell*, *supra*, (Missouri Court of

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[9](...continued)
No. 29C 018907 CT415 (Ind. Cir. Ct. Hamilton County May 24, 1991); *Abelman v. Velsicol Chem. Corp.*, No. 12611 (Md. Cir. Ct. Montgomery County May 17, 1991).

[10] *Couture v. Dow Chemical U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992).

[11] *Arkansas-Platte*, *supra*; *Brennan v. Dow Chemical Co.*, No. 91-2292 (Fla. Ct. App. Feb. 3, 1993); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128 (E.D.N.Y. 1992)(only as to affixed labels); *Casper v. E.I. Dupont De Nemours*, 806 F. Supp. 903 (E.D. Wash. 1992); *King v. E.I. Dupont De Nemours*, 806 F.Supp. 1030 (D. Me. 1992), *appeal filed*, No. 92-2381 (1st Cir. Nov. 20, 1992); and *Gibson v. Dow Chemical Co.*, CV 92-30 (E.D. Ky. Oct. 19, 1992).

[12] Cases ruling that FIFRA impliedly preempts state common law tort theories are the instant case; *Jordan v. Southern Wood Piedmont Company*, 805 F. Supp. 1575 (S.D. Ga. 1992); *Burge v. Jones*, CV B-92-022 (S.D. Tex. Nov. 18, 1992); *Worm*, *supra* (claims not alleging that the label is inconsistent with federal law); *Yowell v. Chevron Chemical Co.*, 836 S.W. 2d 62 (Mo. Ct. App. July 13, 1992); and *Bander v. Southern States Cooperative, Inc.*, No. 92-CA-19196 (Md. Cir. Ct. Howard Cty., Dec. 31, 1992).

Appeals), *Brennan*, *supra*, (Florida District Court of Appeals), and the instant case.[13]

The existence of thirteen court opinions on this question in about eight months, which employ a variety of analyses and reach different conclusions, shows the dire state of the law in this area. The confusion has already gone on too long. Only this Court can eliminate it.

The spectrum of division is revealed by four cases which reach different conclusions while trying to apply *Cipollone*.

In *Couture*, *supra*, the court found no preemption for four reasons. First, it applied *Cipollone*'s principle of narrow construction to sections 136v(a) and (b) and concluded that "states are 'free to regulate, through common law remedies, the use and sale of pesticides.'" 804 F.Supp. at 1302, citing *Montana Pole*, 775 F. Supp. at 1344. Second, after finding section 136v(b) "indistinguishable" from section 5(b) of the Federal Cigarette Labeling and Advertising Act of 1965, the court determined that these sections were "expressly designed to preclude states' *rule-making* bodies from mandating labeling and packaging requirements different from those imposed by the EPA pursuant to FIFRA." *Id.* at 1302 (emphasis added). Third, the court found that section 136v(b) "can hardly be interpreted as providing

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[13] In addition, the issue is currently pending before four federal courts of appeal. *See King*, *supra* (express preemption of inadequate labeling claims), *Worm*, *supra*, (implied preemption of some inadequate labeling claims); *Montana Pole*, *supra*, (no preemption); *Parkins v. Mobay Corp.*, No. 1-89-CV-2471-MHS (N.D. Ga. Feb. 11, 1992) (implied preemption of inadequate labeling claims), *appeal filed*, No. 92-8203 (11th Cir. Feb. 25, 1992); and *Papas*, *supra*, (implied preemption of failure to warn claims).

'unambiguous evidence of a clear and manifest purpose of Congress to displace state sovereignty.'" *Id. citing Cipollone*, 112 S.Ct. at 2625-26. Fourth, again citing *Cipollone*, the court concluded that it must remain "circumspect in applying a broad preemption analysis which would displace state law and would extinguish an individual's right under state law to pursue a common law damage action." *Id.*

The Tenth Circuit, in *Arkansas-Platte*, *supra*, originally found implied preemption of a failure to warn claim. After this Court vacated that judgment and remanded for consideration in light of *Cipollone*, the Tenth Circuit found the claim *expressly* preempted. The court compared § 136v(6) with § 5(b) of the 1969 Act in *Cipollone* and found their proscriptions equally broad -- both encompassing state legislative and common law activities. It did not distinguish among methods of labeling and packaging. *Arkansas-Platte*, *supra*, slip op. at 6-7.

The court in *Burke*, *supra*, reached a somewhat different result. It analyzed FIFRA, its regulatory scheme, and the state of preemption law after *Cipollone*. Its analysis led it to the conclusion that FIFRA expressly preempts a claim that products are mislabeled if an EPA-approved label is affixed to it, but does not preempt claims alleging that warnings other than labels or packaging should have been used. 797 F.Supp. at 1140. It held off deciding, pending the conclusion of discovery, whether there is preemption of negligence and design defect claims. *Id.* at 1141, 1142.[14]

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[14] The court did state that, "It is not conceivable that any New York state court would now find FIFRA to have completely preempted all state tort law." 797 F.

(continued...)

While they reached somewhat different results, *Couture* and *Burke* both agreed that FIFRA does not *impliedly* preempt any state common law theories. *Arkansas-Platte* found express preemption, and did not reach implied preemption on remand. In this case, however, the Nevada Supreme Court also cited *Cipollone*'s principles, but improperly concluded that FIFRA impliedly preempts the Davidsons' inadequate warning claims. *Infra* section B. Clearly, there is a problem that needs to be addressed.

Further delay by this Court in resolving the important issue on which these and the other courts disagree -- whether FIFRA preempts inadequate labeling claims -- will only compound the current confusion in the law, and add to the injustice it creates. Despite plain Congressional intent to leave pesticide poisoning victims' common law rights undisturbed, whether injured victims can pursue their claims now depends upon where they live. The instant case presents the issue clearly and without procedural defect. It is a perfect vehicle for ending the state and lower federal court second-guessing about the result this Court would reach.

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[14](...continued)
Supp. at 1142. Citing *Ferebee*, it also addressed the relationship between compliance with federal regulatory standards and liability under state tort law.

> As a general rule, compliance with federal standards does not, in and of itself, immunize a manufacturer or retailer from state law tort liability.... That EPA must determine whether a pesticide "will perform its intended function without unreasonable adverse effects on the environment" under 7 U.S.C. § 136a(c)(5)(C), does not supplant the state's power to render a judgment as to the relative risks and benefits of the product.

797 F.Supp. at 1142.

B. The Nevada Supreme Court's Ruling Clearly Conflicts With This Court's Ruling In *Cipollone*.

Although the Nevada Supreme Court was aware of, and even quoted extensively from, this Court's decision in *Cipollone*, the court's decision finding implied preemption contravened a basic tenet of the *Cipollone* analysis:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, ... there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

112 S.Ct. at 2618 (1992). *See* Pet.App. at 6a n.2 for quotation by the Nevada Supreme Court.

Cipollone mandates that: 1) a court's task during preemption analysis is to ascertain Congressional intent; 2) in conducting this analysis, the court presumes that the historic police powers of the states, including the states' tort remedies, are not superseded; and 3) the presumption against preemption is rebutted only if preemption is the clear and manifest intent of Congress. *Cipollone*, *supra*, 112 S.Ct. at 2617. The first part of the Nevada high court's Order, its analysis of whether FIFRA expressly preempts state tort claims, followed these principles. Pet.App. at 7a-9a. After reviewing decisions coming out on both sides of this issue, the court concluded that there is no express preemption.

Under *Cipollone*, the Nevada Supreme Court should have ended its analysis at that point. But it did not stop there. Instead, it proceeded to apply an implied preemption analysis to the question of Congressional intent in FIFRA, and ultimately found implied preemption.

Had the Nevada Supreme Court terminated its analysis after finding no express preemption under FIFRA, it would have remained in line with *Cipollone*'s dictates. The principle the court failed to apply, however, is basic and essential to a proper analysis. For that reason, this Court should either accept *certiorari* to correct the error or summarily reverse the Nevada high court's implied preemption holding in favor of its initial holding that there is no express preemption under FIFRA.

C. The Nevada State Court Erroneously Decided An Important Federal Question: Whether FIFRA Preempts State Common Law Inadequate Labeling Claims.

The final reason why this Court should review this case is because the Nevada Supreme Court decided an important question of federal law erroneously: whether FIFRA preempts state common law inadequate labeling claims. While the Nevada high court properly held that FIFRA does not expressly preempt common law claims of inadequate labeling, its finding that FIFRA impliedly preempts those claims is plainly incorrect.

1. FIFRA Does Not Expressly Preempt Inadequate Labeling Claims.

Cipollone mandates that the language of a federal statute be construed "narrowly" and "in light of the strong presumption against pre-emption." 112 S. Ct. at 2621. FIFRA's preemption provision states, in its entirety, "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." As the Nevada Supreme Court properly found, this language, narrowly construed, does not expressly preempt inadequate labeling claims. In addition to the reasons given by that court, there are five primary reasons why this is so.

First, § 136v(b) begins with the words "Such State," referring to a State covered by § 136v(a). Section 136v(a), however, only applies to a State that is *regulating*.[15] In *Cipollone*, the seven-member majority agreed that references to "regulation" only concern positive state enactments, and not common law damage actions. *Cipollone*, 112 S.Ct. at 2619. Because the statutory language on its face only prohibits positive state enactments related to labeling, § 136v(b) simply does not apply to common law claims.

Second, § 136v(b) narrowly prohibits states from imposing or continuing in effect "any requirements for labeling or packaging...." In *Cipollone*, this Court concluded that the much broader language used in the 1969

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[15] Section 136v(a) states: "A State may *regulate* the sale or use of any federally registered pesticide or device in the State, but only if and to the extent that the *regulation* does not permit any sale or use prohibited by this subchapter." (Emphasis added.)

Cigarette Act preempts failure to warn claims primarily because the legislative history of that language reveals that Congress intentionally expanded the provision to encompass such claims.[16] *Cipollone*, 112 S.Ct. at 2619-20. In sharp contrast, Congress has never altered the language of § 136v(b) to expand FIFRA's preemptive effect.

Third, by its terms, § 136v(b) only preempts State-imposed labeling requirements that are "in addition to or different from" those required under FIFRA. Although FIFRA regulations contain a number of requirements regarding labeling, the fact that the EPA has accepted a pesticide's label does not necessarily mean that all FIFRA labeling requirements have been satisfied. Under FIFRA, a pesticide is misbranded, *even if the label is approved*, if the label does not contain a warning that is adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(F)-(G).[17] Indeed, the EPA has recognized that "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. at 37,960-61 (Sept. 26, 1984).

Fourth, the wide latitude the EPA gives to pesticide manufacturers to decide the language of pesticide labels (particularly compared to the specific labeling commands that

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[16] The 1969 Act provides: "No requirement *or prohibition based on smoking and health* shall be imposed *under State law with respect to ... advertising or promotion* ..." 15 U.S.C. §1334 (Emphasis added). Each of the separately underlined phrases in this provision independently broaden its reach beyond that of § 136v(b) of FIFRA.

[17] *See* 7 U.S.C. § 136a(f)(2) (the fact that the product was registered with the EPA is no defense to a misbranding charge); § 136d(a)(2) (ongoing obligation to provide the EPA with relevant information).

Congress gives cigarette manufacturers) confirms that § 136v(b) does not expressly preempt common law labeling claims. Under the FIFRA registration scheme, the drafting of the label is left to the registrant. 7 U.S.C. § 136a(c)(1)(C); 40 C.F.R. § 152.50(e). Similarly, it is the registrant who decides that a label change is necessary, who drafts a revised label, and who submits it to the EPA for review. 40 C.F.R. § 152.44. Many label revisions require only EPA notification, not agency approval, 40 C.F.R. § 152.46(a), and some revisions do not require any EPA notification, such as changes in non-mandatory label statements, additions required by other federal laws, or changes in the label format. 40 C.F.R. § 152.46. *See also* §§ 152.130(b) & (c); § 152.132(d)(5).

Fifth, the legislative history of FIFRA demonstrates that § 136v(b) does not expressly preempt common law claims. The legislative history of the 1972 version of FIFRA does not support the assertion that Congress intended to preempt common law claims when it enacted § 136v(b). *See, e.g.*, S. Rep. No. 838, 92d Cong., 2d Sess. (1972). Moreover, Congress *ratified* the D.C. Circuit's 1984 finding in *Ferebee*, *supra*, that § 136v(b) *does not preempt* common law claims when it extensively revised the statute in 1988. At that time, Congress amended FIFRA's preemption provisions by adding the heading "Uniformity" to § 136v(b). Other than this cosmetic change, however, Congress did not address the preemption issue. Under well-established rules of construction, this non-substantive amendment indicates Congressional ratification of *Ferebee*. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

2. The Court Below Erred in Finding Implied Preemption.

This Court held in *Cipollone* that, when a statute contains an express preemption provision that does not preempt state common law claims, a court may not reach the question of implied preemption. *Cipollone*, *supra*, 112 S. Ct. at 2618. For this reason, the Nevada Supreme Court's finding of implied preemption, and its reasoning behind it, is clear error.

First, the Nevada Supreme Court's conclusion that Congress intended FIFRA to "occupy the field" of pesticide labeling is erroneous. To the extent that FIFRA arguably evidences Congressional intent to limit state action in any "field," it is the "field" of "pesticide labeling regulation" and, even then, FIFRA explicitly preserves the power of the states to "regulate the sale or use" of any pesticide as long as the regulations are not "in addition to or different from" what is required under FIFRA. §§ 136v(a)-(b); *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476 (1991). Moreover, the "field" at issue in this case is the "field" of pesticide victim compensation and, as Congressional ratification of *Ferebee* in 1980 confirms, Congress intended to leave the powers of the states in this "field" untouched.

Second, as the above discussion of FIFRA's labeling requirements makes clear, there is no conflict between EPA regulations and state liability for common law failure to warn. On the contrary, state common law liability for failure to warn enhances the EPA's regulatory efforts by providing pesticide manufacturers with an incentive to improve their labels and products on their own. *See*, *e.g.*, *Thornton v.*

Fondren Green Apartments, 788 F.Supp. 928, 932 (S.D. Tex. 1992).[18]

FIFRA simply does not preempt common law inadequate labeling claims.

CONCLUSION

The Court should grant this petition for a writ of *certiorari* or, in the alternative, summarily reverse the Nevada Supreme Court's holding of implied preemption in favor of its initial holding that there is no express preemption under FIFRA.

Respectfully submitted,

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March 1, 1993

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[18] This is particularly important because, despite the laudatory goals of federal pesticide regulation, the EPA has not been able to fully review the safety of a large number of pesticides that are currently on the market. *See, e.g.*, U.S. GAO, Lawn Care Pesticides: Risks Remain Uncertain While Prohibited Safety Claims Continue (1990) (reporting that 32 of the 34 most widely used lawn care pesticides had not been reassessed for their long-term health risks).

IN THE
SUPREME COURT OF THE STATE OF NEVADA

ERNEST DAVIDSON, DARLENE DAVIDSON, Individually and as Guardians ad Litem of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR., their minor children,	)	No. 22464
Appellants,	)	
vs.	)	FILED
	)	Aug. 12, 1992
VELSICOL CHEMICAL CORPORATION, an Illinois corporation,	)	
Respondent.	)	

Interlocutory appeal from an order of the district court granting respondent's motion in limine in a products liability action. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, Judge.

Affirmed.

Johns & Johns, Las Vegas,
for Appellants.

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Woodbury, Las Vegas; and
Spriggs & Hollingsworth,
Washington, D.C.,

for Respondent.

Crockett & Myers, Las Vegas; Baron & Budd and Charles S. Siegel, Dallas, Texas; and Arthur Bryant and Priscilla Budeiri, Washington, D.C., for Amicus Curiae Trial Lawyers for Public Justice.

Cory, MacDonald & Van, Las Vegas, for National Pest Control Association.

OPINION

PER CURIAM:

The main issue presented by this appeal is whether the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et. seq. ("FIFRA"), pre-empts state common law actions against the manufacturers of pesticides based on failure to adequately label the pesticides. For the reasons set forth below, we conclude that FIFRA impliedly pre-empts such tort claims.

FACTS

In March of 1986, appellants ("the Davidsons") filed suit against respondent Velsicol Chemical Corporation ("Velsicol"). The Davidsons alleged that in 1979, Bill Beckmeyer's Pest-A-Way ("Pestaway") applied Gold Crest Termide, a termiticide produced by Velsicol, to their partially constructed home. Pestaway sprayed, by a method called "broadcast spraying," the ground in an area intended for the home's crawl space.[1] By broadcast spraying, toxic chemicals allegedly migrated into the Davidsons' home.

The Davidsons claimed that Velsicol failed to give adequate warning and appropriate instructions concerning the application of its product to the foundation of newly constructed residences, namely, that broadcast spraying was inappropriate. They further claimed that as a result, they were exposed to harmful quantities of chemicals contained in Gold Crest Termide and suffered personal injuries. The Davidsons sought compensatory and punitive damages based on failure to warn, negligence and strict liability.

In 1980, after Pestaway had sprayed the Davidsons' home, Velsicol changed its label to provide a strict prohibition against broadcast spraying areas designated for crawl spaces. The Davidsons moved in limine for a ruling that the post-accident label change on Velsicol's Gold Crest Termide be admissible at trial. Velsicol countered in limine,

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[1]The Davidsons contrast broadcast spraying to "rodding and trenching." Broadcast is defined as "[c]ast abroad or all over an area, as seed sown thus rather than in drills or rows." The Living Webster Encyclopedic Dictionary 124 (1975).

seeking a ruling that FIFRA pre-empted state tort claims based on a failure to adequately label or warn and that the evidence of subsequent remedial measures was inadmissible.

The district court ruled that FIFRA impliedly pre-empts state common law tort suits against "manufacturers of Environmental Protection Agency ("EPA")-registered pesticides to the extent that such actions are based on claims of inadequate labeling." The district court also ruled that the evidence of the subsequent remedial measures was inadmissible.

DISCUSSION

Under the Supremacy Clause, U.S. Const., Art. VI, cl.2, state laws which are contrary to, or which interfere with, the laws of Congress are invalid. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2481 (1991) (citing Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824)). "If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). This intent may be either expressed in the terms of the statute or implied. Mortier, 111 S. Ct. at 2481. Where Congress has expressly provided for pre-emption, resort to the implied pre-emption doctrines is unnecessary; instead, the court need only determine the scope of the pre-emption. Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703, 4707 (U.S. June 24, 1992).

In determining whether state law is pre-empted, courts must presume that the historic police powers of the states are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress. Rice v. Santa

Fe Elevator Corp., 331 U.S. 218, 220 (1947). Tort remedies which compensate for personal injuries are traditionally considered properly within the scope of state superintendence. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963). The burden of establishing pre-emption is on the party seeking to give the statute such effect. Silkwood, 464 U.S. at 255.

The Davidsons argue that FIFRA does not pre-empt its inadequate labeling claims against Velsicol. They cite Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1539 (D.C. Cir. 1984), cert. denied, 469 U.S. 1062 (1985), wherein the United States Court of Appeals for the District of Columbia held that FIFRA does not pre-empt such tort claims.

Velsicol, in turn, argues that the district court properly found that FIFRA pre-empts the Davidson's claims. Velsicol relies on Arkansas-Platte & Gulf v. Van Waters & Rogers, 959 F.2d 158 (10th Cir. 1992), where the United States Court of Appeals for the Tenth Circuit held that state damage actions based on labeling and failure to warn are impliedly pre-empted by FIFRA.[2]

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[2]Velsicol also relies on Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991). At the time of oral arguments in this case, a petition for writ of certiorari had ben filed in Papas. See 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837). However, since oral arguments, the United States Supreme Court issued a summary order granting certiorari, vacating the judgment and "remand[ing] to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Cipollone v. Liggett Group, Inc., [60 U.S.L.W. 4703 (U.S. June 24, 1992)]." See Papas v. Zoecon Corp., 60 U.S.L.W. 3878 (U.S. June 29, 1992).

Cipollone involved whether the Public Health Cigarette Smoking Act of 1969 or its 1965 predecessor, the Federal Cigarette Labeling and Advertising Act, pre-empted petitioner's common law claims against several cigarette

There is a split of authority on this issue. Ferebee and Arkansas-Platte represent the two views, and we therefore confine our discussion to these cases.[3]

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manufacturers. Cipollone, 60 U.S.L.W. at 4704. Cipollone announced that if there is a determination of express pre-emption, it is not necessary to infer Congressional intent (through the application of the implied pre-emption doctrines). Cipollone, 60 U.S.L.W. at 4707.

The Papas court apparently contravened the pre-emption analysis set forth in Cipollone by failing to determine whether FIFRA expressly pre-empts state tort claims based on inadequate labeling. See Papas, 926 F.2d at 1024 ("[W]e admit to a little uncertainty and pass over the question of express preemption.") Our opinion is consonant with Cipollone in that we address implied pre-emption only after concluding that FIFRA does not expressly pre-empt such claims (as discussed below).

We do not find Cipollone instructive on whether FIFRA pre-empts the Davidsons' claims; thus, we decline to draw anything further from the Court's summary reconsideration order. Perhaps Justice Blackmun articulated it best in Cipollone when he stated: "I can only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision." Cipollone, 60 U.S.L.W. at 4714.

[3]Federal district courts finding pre-emption include Hurt v. Dow Chemical Co., 759 F. Supp. 556 (E.D. Mo. 1990); Kennan v. Dow Chemical Co., 717 F. Supp. 799 (M.D. Fla. 1989); Fisher v. Chevron Chemical Co., 716 F. Supp. 1283 (W.D. Mo. 1989); Herr v. Carolina Log Bldgs., Inc., 771 F. Supp. 958 (S.D. Ind. 1989); Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404 (E.D. Mich. 1987).

Cases in which district courts found no pre-emption include Riden v. ICI Americas, Inc., 763 F. Supp. 1500 (W.D. Mo. 1991); Evenson v. Osmose Wood Preserving Inc., 760 F. Supp. 1345 (S.D. Ind. 1990); Stewart v. Ortho Consumer Products, No. 87-4252, 1991 WL 36129 (E.D. La. 1990); Cox v. Velsicol Chem. Corp., 704 F. Supp. 85 (E.D. Pa. 1989); Roberts v. Dow Chem. Co., 702 F. Supp. 195 (N.D. Ill. 1988).

I. Congress did not expressly pre-empt state tort claims.

Velsicol argues that FIFRA expressly pre-empts state tort claims which are based on failure to adequately label. FIFRA provides:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

7 U.S.C. § 136v(a) - (b). Based on this language, several courts have held that FIFRA expressly pre-empts state action regarding pesticide labeling. See e.g., Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404, 406 (E.D. Mich. 1987); and Kennan v. Dow Chemical Co., 717 F. Supp. 799, 807 (M.D. Fla. 1989) (pre-emption based on the express language and legislative history).

However, the majority of courts hold that FIFRA does not expressly pre-empt state action of pesticide labeling. See, e.g., Ferebee, 736 F.2d at 1542; Montana Pole & Treating Plant v. I.F. Laucks, 775 F. Supp. 1339, 1343 (D.

Mont. 1991); Riden v. ICI Americas, Inc., 763 F. Supp. 1500, 1505 (W.D. Mo. 1991); Hurt v. Dow Chemical Co., 759 F. Supp. 556, 558-59 (E.D. Mo. 1990); Fisher v. Chevron Chemical Co., 716 F. Supp. 1283, 1286-87 (W.D. Mo. 1989).

We conclude that the majority's position is more persuasive. Although FIFRA provides that states shall not "impose or continue in effect" labeling requirements which differ from FIFRA, section 136v(b) makes no reference to the pre-emption of state common law remedies. Because Congress has expressly pre-empted common law in other pre-emption clauses, Congress' silence cannot be ignored -- it is inimical to a finding of express pre-emption. Riden, 763 F. Supp. at 1505-06. Indeed, as stated by the New Jersey Supreme Court, courts should not strain to find pre-emption of state law:

> [O]ur federal system, with its high regard for the several States' powers of governance requires that judges not preempt state law lightly. . . . [W]hen the Supreme Court considers whether the Congress has preempted state law, "[a]ny indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority."

Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1251 (N.J. 1990) (quoting in part Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 780

(1947)).[4] Therefore, we hold that FIFRA does not expressly pre-empt state tort actions against pesticide manufacturers based on failure to adequately warn or label.

II. Congress implicitly intended to pre-empt state tort claims.

The next question is whether Congress implicitly intended to pre-empt state tort claims. Mortier, 111 S. Ct. at 2481. Congress' intent may be implied if Congress occupies an entire field or if there is an actual conflict between state and federal law. Arkansas-Platte, 959 F.2d at 161.

A. Congress occupies the entire field of pesticide labeling.

Congress occupies an entire field if: (1) the federal regulation is so pervasive such that Congress left no room for the states to supplement it; (2) the federal act involves a field in which the federal interest completely dominates the field; or (3) if the goals sought or the obligations imposed by the federal law reveal a purpose to preclude state authority. Mortier, 111 S. Ct. at 2481-82.

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[4]In the same fashion as Congress could have included a reference to pre-emption of state common law, Congress could have also included a "savings clause" expressly sheltering state common law as it did in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(4) (1982). Fisher, 716 F. Supp. at 1287, n.1. Thus, the lack of reference to state common law is important only because of the presumption against pre-emption. Id.

The Ferebee court recognized that FIFRA does not allow states to directly impose additional labeling requirements. Ferebee, 736 F.2d at 1541. The court, however, reasoned that state action which has the effect of changing federal labeling requirements is permissible because it falls within the states' power to regulate the "sale or use" of pesticides authorized in § 136v(a). Id.

In contrast, the Arkansas-Platte court held that FIFRA impliedly pre-empted state tort actions, reasoning that the federal government occupies the entire field of regulating labels. Arkansas-Platte, 959 F.2d at 164. Our review of the legislative history and the federal regulations supports a ruling that Congress occupies the entire field of pesticide labeling regulation.

In 1947, Congress enacted FIFRA to replace the Insecticide Act of 1910. Mortier, 111 S. Ct. at 2479 (citing 61 Stat. 163). Originally, FIFRA "was primarily a licensing and labeling statute." Id. (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984)). Increased environmental and safety concerns prompted Congress to comprehensively amend FIFRA in 1972. Id. (citing 86 Stat. 973). These amendments enhanced FIFRA's registration and labeling standards, and the EPA was granted increased enforcement authority. Id. at 2479-80. Thus the 1972 amendments converted FIFRA from a labeling law into a comprehensive regulatory statute. Id. (quoting Ruckelshaus, 467 U.S. at 991).

A House of Representatives' report on the 1972 amendments to FIFRA indicated the proposed authority of the states:

> The States are given prime responsibility for the certification and supervision of pesticide applicators. The Federal Government sets the program standards the States must meet. State authority to change Federal labeling and packaging is completely preempted, and State authority to further regulate "general use" pesticides is partially preempted.

H.R. Rep. No. 511, 92d Cong., 2d Sess. 1-2 (1972) (emphasis added). This report reiterated that:

> In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee has adopted language which is intended to completely preempt State authority in regard to labeling and packaging.

Id. at 16 (emphasis added).

Moreover, in its report to the Senate, the Agriculture and Forestry Committee noted that section 136v(b) "preempts any state labeling or packaging requirements different from such requirements under the Act." S. Rep. No. 838, 92 Cong., 2d Sess. (1972) reprinted in 1972 U.S.C.C.A.N. 3993, 4021 (emphasis added); see also, S. Rep. No. 970, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 4092, 4128 (the Commerce Committee also stated that § 136v(b)

"pre-empts" any state labeling or packaging requirements).[5]

The 1972 Amendments added 7 U.S.C. § 136v. That section, captioned "Authority of the States," provided in part:

> (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].
>
> (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

7 U.S.C. § 136v(a) - (b). In 1988, Congress added the title, "In general," to subsection (a) and added the title, "Uniformity," to subsection (b). Pub. L. No. 100-532, 102 Stat. 2654, 2682 (1988).

FIFRA precludes the EPA from authorizing the sale of a pesticide unless the product, as labelled, will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). Such effects are defined as: "[A]ny unreasonable risk to man or the environment, taking into account the economical, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb). The label must be such that it is "likely to be read and understood by the ordinary individual under customary

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[5]House Report 10729, which ultimately was enacted as the 1972 amendments, was referred to two committees: (1) the Agriculture and Forestry Committee, and (2) the Commerce Committee. See S. Rep. No. 838, 92d Cong., 2d Sess. (1972), reprinted in 172 [sic] U.S.C.C.A.N. 3993; S. Rep. No. 970, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 4092 (1972).

conditions of purchase and use." 7 U.S.C. § 136(q)(1)(E).

The EPA cannot approve a pesticide unless it complies with FIFRA's requirements, as set forth in § 136a(c)(5), and the EPA's labeling requirements. 40 C.F.R. § 152.112(f). The EPA has extensively regulated pesticide labeling, see generally 40 C.F.R. § 156 (1991), and provides specific requirements for the contents of each label (including ingredient statements, warnings, and directions for use). 40 C.F.R. § 156.10(a)(1). The EPA details how warnings are to be presented and provides specific requirements for the content, placement, type, size and prominence of the warnings. 40 C.F.R. § 156.10(h).

Also, there must be a statement of practical treatment. 40 C.F.R. § 156.10(h)(1)(iii). If hazards exist to humans and domestic animals, precautionary statements are required which "indicat[e] the particular hazard, the route(s) of exposure and the precautions to be taken to avoid accident, injury or damage." 40 C.F.R. § 156.10(h)(2)(i)(A). Directions for use of the pesticide must be stated in terms which are easy to read and understand by the average person. 40 C.F.R. § 156.10(i)(1)(i). When followed, they must be sufficient to protect the public "from fraud and from personal injury." Id. If a pesticide manufacturer violates either the general requirements of FIFRA or the regulations promulgated by the EPA, the EPA will notify the United States Attorney General who, in turn, will institute criminal or civil proceedings against the violator. 7 U.S.C. § 136g(c)(1).[6]

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[6]Among other things, FIFRA makes it unlawful to sell or distribute a pesticide that is not registered or to alter the EPA-approved composition of the product. 7 U.S.C. §136j(a)(1)(A), (2)(M). In addition, it is unlawful to sell a

We reject Ferebee's reading of FIFRA as it conflicts with the language and legislative history of the statute. First, the excerpts from the legislative history demonstrate that Congress intended section 136v(b) to "completely pre-empt" state authority to change federal labeling. See e.g., H.R. Rep. No. 511, 92d Cong., 2d Sess. 1-2 (1972). Second, it is unlikely that Congress would have designated federal control over labeling in section 136v(b) if it thought that the provision could be circumvented by state action authorized by § 136v(a). Third, federal regulation of pesticide labeling created by FIFRA is "so pervasive" and "so dominant" such that Congress left no room for the states to supplement it.[7]

Therefore, we hold that FIFRA occupies the entire field of pesticide labeling and implicitly pre-empts state tort claims based on failure to adequately label the pesticide.[8]

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misbranded pesticide. (See 7 U.S.C. §136(q)(1) for a description of when a pesticide is misbranded.

[7]Several courts have sidestepped this aspect of FIFRA by finding that FIFRA does not create a comprehensive scheme to pre-empt "all state law claims." See e.g., Riden, 763 F. Supp. at 1506. These courts have approached implied pre-emption too broadly. The dispositive question is whether FIFRA occupies the particular field of pesticide labeling. See Mortier, 111 S. Ct. at 2486 ("Whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular.")

[8]This holding is strengthened by the recent United States Supreme Court's decision in Mortier, where the Court noted that the entire field of pesticide regulation was not pre-empted but, in dicta, emphasized that pesticide labeling was pre-empted. Mortier, 111 S. Ct. at 2486; see also Arkansas-Platte, 959 F.2d at 163. In Mortier, the Court stated:

> In the first place, §136v itself undercuts such an inference. The provision immediately following the statute's grant of regulatory authority to the States declares that "[s]uch State shall not impose or continue in effect any requirements for

B. State tort claims conflict with FIFRA.

The final question is whether state tort claims actually conflict with FIFRA. Mortier, 111 S. Ct. at 2482. There is an actual conflict when compliance with both state and federal law is physically impossible, or when a state law obstructs the accomplishment and execution of the full purposes and objectives of Congress. Id.

The Ferebee court concluded that tort damages did not create an actual conflict. Ferebee, 736 F.2d at 1542. The court reasoned that compliance with both FIFRA and state tort law was not impossible because the manufacturer can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs; alternatively, the manufacturer can petition the EPA for a more comprehensive label. Id. This analysis has been identified as a "choice of reaction" analysis. See, e.g., Hurt, 759 F. Supp. at 559.

The Ferebee court also concluded that state common law did not stand as an obstacle to the accomplishment of

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> labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation. Taking such pre-emption as the premise, § 136v(a) would thus grant States the authority to regulate the "sale or use" of pesticides while § 136v(b) would superfluously add that States did not have the authority to regulate "labeling or packaging," an addition that would have been doubly superfluous given FIFRA's historic focus on labeling to begin with.

Mortier, 111 S. Ct. at 2486 (emphasis added).

FIFRA's purposes. The courts stated that such a conflict would exist only if FIFRA was an "affirmative subsidization" of the pesticide industry, not a regulatory statute directed at public safety. Ferebee, 736 F.2d at 1542-43.

In contrast, Arkansas-Platte held that jury awards of damages would result in a direct conflict with FIFRA. Arkansas-Plate, 759 F.2d at 164. We agree. By registering a pesticide, the EPA has determined that the labels are adequate to protect man and the environment because it does not pose "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." A jury determination that a pesticide labeling is inadequate directly conflicts with the EPA's determination that the label is adequate and, secondly, the EPA Administrator's determination that the risks to man and environment are outweighed by the beneficial aspects of the pesticide.

Furthermore, as noted in Arkansas-Platte, such state damage actions would hinder Congress' goal of reaching uniformity in pesticide labeling.[9] Id. at 162. If a jury

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[9]In 1988, Congress amended this section without changing the language of § 136v(b) by adding the heading "Uniformity" to this section. Pub. L. 100-532, § 801(m) (1988).

determined that a label was inadequate, a manufacturer would have to change the label or risk additional suits for damages. These changes would destroy the uniformity sought by Congress because warning labels for that pesticide would not be based on the same criteria the EPA uses to establish warnings for all other pesticides.

Though a manufacturer could "physically" comply with both federal and state requirements as articulated in Ferebee, we reject Ferebee's "choice of reaction" analysis because such jury determinations would realistically force manufacturers to change their labels. "A business choice between paying damages and changing the label is only notional." Id. at 162. Ferebee's "choice of reaction" is more an articulation of semantics, rather than articulation of actual choices. As one court stated:

> This "choice of reaction" seems akin to the free choice of coming up for air after being underwater. Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable than any manufacturer would not immediately take steps to minimize its exposure to continued liability.

Palmer, 825 F.2d 627-28 (discussing the "choice of reaction" analysis under the Federal Cigarette Labeling and Advertising Act).

We conclude that a jury determination that a label is inadequate would directly conflict with the EPA's determination that the label is adequate to protect man and

the environment. National uniformity in pesticide labeling would also be frustrated by state common law tort claims. Therefore, we hold that these claims are pre-empted because they" actually conflict" with FIFRA.

CONCLUSION

In sum, we hold that FIFRA does not expressly pre-empt state tort claims based on inadequate labeling but that FIFRA impliedly pre-empts such claims. Our resolution of this issue makes it unnecessary for us to address the Davidson's remaining contention. Accordingly, for the reasons stated above, we affirm the order of the district court.

/s/_____, C.J.
Mowbray

/s/_____, J.
Springer

/s/_____, J.
Rose

/s/_____, J.
Young

/s/_____, D.J.[10]
Carnahan

[10]The Honorable Lew Carnahan, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of the Honorable Thomas L. Stefen, Justice. New. Const. art. 6, §4.

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

ERNEST DAVIDSON, DARLENE DAVIDSON, Individually and as Guardians ad Litem of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR., their minor children,	)
Plaintiffs,	)
vs.	) CASE NO. A 246535
	) DEPT NO. III
VELSICOL CHEMICAL CORPORATION, An Illinois corporation,	) DOCKET "E"
	) **ORDER RE: POST-1979 LABEL**
Defendant.	) **CHANGES**

Plaintiffs' motion in limine re: post-1979 label changes and Defendant's counter-motion in limine re: post-1979 label changes came on for hearing on February 11, 1991. Plaintiffs were represented by Larry Johns, Esq. of JOHNS & JOHNS, LTD. Defendant was represented by Katharine R. Latimer, Esq. of SPRIGGS & HOLLINGSWORTH and Jay Earl Smith, Esq. of JOLLEY, URGA, WIRTH & WOODBURY. The Court took the matter under advisement after listening to the arguments of counsel for the parties and requesting the submission of additional points and authorities by the parties.

After reviewing the pleadings and papers on file, and after considering the argument of counsel for the parties, the Court hereby finds:

1. The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, impliedly preempts state common law tort suits against manufacturers of Environmental Protection Agency ("EPA")-registered pesticides to the extent that such actions are based on claims of inadequate labeling.

A. The federal government has occupied the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions.

B. For EPA-registered pesticides, the

warning and use statements present on the label indicate that the EPA has determined that those statements are adequate to protect man and the environment: that the pesticide as labeled does not pose 'any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.'

C. A jury determination, via a state common law tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the Congressional intent and the EPA's determination that the labeling is adequate to protect against health risks.

D. Allowing state common law tort actions based on labeling claims would wrongfully permit state court juries to do what state legislatures and state administrative agencies are forbidden to do: impose requirements for labeling pesticides.

2. The adequacy of the 1979 Gold Crest Termide label was conclusively established by the EPA and Plaintiffs' tort claim based on the alleged inadequacy of such label is preempted by federal law.

3. Evidence relating to post-1979 Gold Crest Termide label changes is an inadmissible subsequent remedial measure relating to Plaintiffs' claim that Defendant breached its duty of due and reasonable care.

4. Under the circumstances of this case, evidence of any post-1979 Gold Crest Termide label change would unfairly prejudice Defendant and confuse the jury.

Good cause appearing, it is hereby

ORDERED that Plaintiffs' motion in limine re: post-1979 label changes is denied; and it is further

ORDERED that Defendant's counter-motion in limine re: post-1979 label changes is granted; and it is further

ORDERED that all evidence relating to post-1979 Gold Crest Termide label changes shall be excluded from evidence at the trial of this matter.

DATED this 5 day of April, 1991.

JOSEPH S. PAVLIKOWSKI
DISTRICT COURT JUDGE

Submitted by:

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Attorneys for Velsicol Chemical corporation

DATED: April 3, 1991

Approved as to form and content by:

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Attorneys for Plaintiffs

DATED: 4-4-91

DISTRICT COURT
CLARK COUNTY, NEVADA

ERNEST DAVIDSON, DARLENE DAVIDSON, Individually and as Guardians ad Litem of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR., their minor children,	)	
Plaintiffs,	)	
vs.	)	CASE NO. A 246535
	)	DEPT NO. III
VELSICOL CHEMICAL CORPORATION, An Illinois corporation,	)	DOCKET "E"
Defendant.	)	

ORDER CERTIFYING FINAL ORDER FOR INTERLOCUTORY APPEAL

Plaintiffs' Motion for Rehearing and Reconsideration, and/or for Certification for Interlocutory Appeal of This Court's Order of April 5, 1991 having come on for hearing on the 20th day of May, 1991, Plaintiffs appearing by and through their attorney, Larry C. Johns, Esq. and Defendant

VELSICOL appearing by and through Brian Holthus, Esq.; the Court having considered Plaintiffs' Motion, together with the arguments of Plaintiffs' counsel, and having considered Defendant VELSICOL's response thereto wherein VELSICOL concurred with Plaintiffs that this Court's Order of April 5, 1991 should be certified as a final order for interlocutory appeal pursuant to NRCP 54 (b), and the Court being fully advised in the premises,

NOW THEREFORE, the Court enters the following Findings and Order.

FINDINGS

I

On April 5, 1991, this Court entered its Order Re: Post-1979 Label Changes, specifically finding

> "1. Thee Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, impliedly preempts state common law tort suits against manufacturers of Environmental Protection Agency ("EPA")-registered pesticides to the extent that such actions are based on claims of inadequate labeling.
>
> > "A. The federal government has occupied the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions.

"B. For EPA- registered pesticides, the warning and use statements present on the label indicate that the EPA has determined that those statements are adequate to protect man and the environment: that the pesticide as labeled does not pose 'any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide.'

"C. A jury determination, via a state common law tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the Congressional intent and the EPA's determination that the labeling is adequate to protect against health risks.

"D. Allowing State common law tort actions based on labeling claims would wrongfully permit state court juries to do what state legislatures and state administrative agencies are forbidden to do: impose requirements for labeling pesticides.

"2. The adequacy of the 1979 Gold Crest Termide label was conclusively established by the EPA and Plaintiffs' tort claim based on the alleged inadequacy of such label is preempted by federal law.

"3. Evidence relating to post-1979 Gold Crest Termide label changes is an inadmissible subsequent remedial measure relating to Plaintiffs' claim that

Defendant breached its duty of due and reasonable care.

"4. Under the circumstances of this case, evidence of any post-1979 Gold Crest Termide label change would unfairly prejudice Defendant and confuse the jury."

"Good cause appearing, it is hereby

"ORDERED that Plaintiffs' motion in limine re: Post-1979 label changes is denied; and it is further

"ORDERED that Defendant's counter-motion in limine is granted; and it is further

"ORDERED that all evidence relating to post-1979 Gold Crest Termide label changes shall be excluded from evidence at the trial of this matter."

II

That the above Order, although styled and Order granting Motions in Limine, is in fact an Order Granting Partial Summary Judgment in favor of Defendant VELSICOL as to all of Plaintiffs' claims which were based upon the alleged inadequacies of VELSICOL's labeling of its product, Gold Crest Termide, at the time it was applied at the Plaintiffs' home in July, 1979.

III

That this Court's ruling regarding the pre-emptive effect of FIFRA involves purely a question of law and more particularly, an issue of pre-emption of state law and claims based on Nevada law.

That there are no United States Supreme Court or Federal decisions directly on point which are binding upon the courts of Nevada nor has the Nevada Supreme Court had an opportunity to address or resolve the preemption issue involved in this case.

V

That the issue is one of first impression in Nevada, is a fundamental legal issue underlying Plaintiffs' product liability and negligence claims against Defendant VELSICOL and should be certified for Interlocutory Appeal and determination by the Nevada Supreme Court.

VI

That there is no just reason for delay of resolution of this purely legal issue as provided by NRCP 54(b).

NOW THEREFORE, IT IS ORDERED that Plaintiffs' Motion for Reconsideration is denied, and it is further

ORDERED that this Court's Findings and Order of April 5, 1991 is certified as a final order for interlocutory

appeal to the Nevada Supreme Court, and it is further

ORDERED that the trial date of September 16, 1991 is vacated and all pre-trial and discovery matters are stayed pending resolution of the appeal.

DATED AND DONE this 5th day of June, 1991.

JOSEPH PAVLIKOWSKI
DISTRICT JUDGE

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IN THE
SUPREME COURT OF THE STATE OF NEVADA

ERNEST DAVIDSON, DARLENE DAVIDSON, Individually and as Guardians ad Litem of SHERENE DAVIDSON AND ERNEST DAVIDSON, JR., their minor children,	)	No. 22464
Appellants,	)	
vs.	)	
	)	Filed Nov. 3, 1992
VELSICOL CHEMICAL CORPORATION, an Illinois corporation,	)	
Respondent.	)	

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[11]

[11]The Honorable Thomas J. Steffen, Justice, did not participate in the decision of this appeal.

/s/ _____, C.J.
Mowbray

/s/ _____, J.
Springer

/s/ _____, J.
Rose

/s/ _____, J.
Young

cc: Hon. Joseph S. Pavlikowski,
District Judge
Johns & Johns
Jolley, Urga, Wirth & Woodbury
Spriggs & Hollingsworth
Crockett & Myers
Baron & Budd
Arthur Bryant
Priscilla Budeiri
Cory, MacDonald & Van
Loretta Bowman, Clerk

Supreme Court of the United States

No. A-528

Ernest Davidson, et ux., Petitioners,

v.

Velsicol Chemical Corp.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including March 1, 1993.

s/ Sandra Day O'Connor
Associate Justice of
the Supreme Court of the
United States

Dated this 8th
day of January, 1993.